STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2010
v	No. 290456 Oakland Circuit Court
MARK ANTHONY GOODING, Defendant-Appellant.	LC No. 2008-221364-FH

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for first-degree home invasion, MCL 750.110a(2). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arose out of his attempt to break into the apartment of Larry Walls at approximately 3:00 a.m. on May 31, 2008, while Walls and his friend Marlena Thomas were present. According to their testimony, Walls and Thomas encountered defendant on May 30, 2008, while walking; an altercation ensued between defendant and Thomas, and defendant struck Thomas. Thomas and Walls returned to Walls's apartment. Several hours later there was a loud knock at the front door, and someone broke the glass on the door. Walls testified that he looked out the peephole and saw defendant, who was threatening to kick down the door. Walls told defendant that he was calling the police, and defendant left. Sometime later, a patio door window in the living room was broken. Walls called the police, and officers arrived and inspected the broken window. Walls testified that, after the police had left and he and Thomas had gone to sleep, they awoke to another "great big bang with a huge cinder block coming through the bedroom window." Walls called the police, and told Thomas not to let defendant enter the apartment. Walls and Thomas testified that defendant moved aside the broken glass and put his head through the broken window. Thomas testified that as defendant did so, she took a pistol from underneath a chair and shot defendant in the neck. Defendant ran as Walls again called 911.

At trial, defendant claimed that he only went to Walls's apartment because he heard the police were looking for him in connection with an attempted break-in. He stated that he noticed the broken windows when he arrived, and heard a noise nearby. He called for Walls as he moved toward the window, and then he was shot.

On appeal, defendant raises a number of claims of ineffective assistance of trial counsel. A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed de novo. *Id*. However, because no *Ginther*[1] hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

'"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise."' *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id*. "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*., quoting *Solmonson*, 261 Mich App at 663-664.

A. RES GESTAE TESTIMONY

Defendant first argues that trial counsel was ineffective because she failed to call as a witness Pontiac Police Officer James Stefani, who arrived at the apartment with his partner after Walls's report of the breaking of the patio window, to highlight inconsistencies between Walls's and Thomas's trial testimony and the statements the two made to the police on the night of the incident.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The failure to call witnesses constitutes ineffective assistance only if it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996). A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Citing to Officer Stefani's crime report, defendant specifically notes that the victims told the responding officers that they did not see defendant break the entryway window or the living room window, and argues that this difference from the victims' trial testimony was significant. As noted by the prosecutor on appeal, Officer Stefani's testimony concerning the victims' out of court statements likely would have been inadmissible hearsay. MRE 801, MRE 802. Defendant has not offered any applicable hearsay exception. Moreover, the written police report was not

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

inconsistent with the repeated testimony of Walls and Thomas. Walls testified that he did not actually see defendant break the windows, but Walls saw defendant through the peephole after the front door window was broken, and then Walls saw defendant moving the curtains after the living room window was broken. Likewise, Thomas testified that she did not see defendant break the windows. However, she stated that she heard defendant's voice when the front door window was broken and then later saw him coming through the broken bedroom window. Trial counsel reasonably could have determined that any benefit from having Stefani corroborate the victims' trial testimony would have been outweighed by the risk that Officer Stefani would repeat incriminating statements made by defendant during his initial assaults on the apartment, including "ain't nobody gonna mess with Mark Goodie [sic]!" Given the evidence presented, we find that defendant has not rebutted the presumption of trial strategy, *Davis*, 250 Mich App at 368, and defendant has failed to demonstrate that Officer Stefani's testimony would have made a difference in the outcome of the trial. *Hyland*, 212 Mich App at 710. Therefore, we find defendant's first claim of ineffective assistance of counsel without merit.

B. FAILURE TO INVESTIGATE

Defendant next argues that trial counsel should have investigated his medical records and presented medical evidence and testimony to show that he had no cuts or abrasions on his hands despite the claims that he broke out several windows in a rage. Defendant's claim that counsel failed to investigate his medical records is directly contradicted by defendant's admission in his affidavit that he and counsel spoke about this issue, and that counsel saw his medical records. Again, we find that defendant has not rebutted the presumption of trial strategy here because, instead of presenting defendant's medical records to the jury, counsel focused the closing argument on the lack of physical evidence presented by the prosecutor. Furthermore, defendant cannot show that the presentation of the medical records would have been outcome determinative. No testimony indicates that defendant broke the windows with his hands. To the contrary, one of the investigating officers testified that the officers found a brick in the bedroom, which is consistent with Walls's testimony that defendant threw a cinder block through the window. Defendant's second claim of ineffective assistance of counsel is therefore without merit.

C. EMERGENCY CALLS

Defendant raises two claims of error concerning emergency calls made pursuant to this incident. First, defendant argues that trial counsel erred by failing to call the 911 operator to testify that the operator never reported hearing a gunshot during Walls's calls. Defendant maintains that this testimony would have contradicted the victims' trial testimony and the prosecution's assertion that defendant was trying to break into the home when Thomas shot him. However, defendant has failed to demonstrate that the operator's testimony would have made a difference in the outcome of the trial. *Hyland*, 212 Mich App at 710. Walls did not testify that he was on the phone with the 911 operator when Thomas shot defendant. Instead, he stated that he had hung up the phone before Thomas shot defendant and that he called the police again afterward. In any event, the jury heard recordings of all of the 911 calls and the operator's testimony regarding what the operator heard and reported from those calls would have been cumulative.

Second, defendant argues that trial counsel erred by failing to object to the introduction of 911 "dispatch calls" that were played for the jury without the inclusion of a transcript of the calls.[2] He maintains that the recordings constituted inadmissible hearsay, and violated his rights to confrontation and due process. Defendant's hearsay argument is abandoned. A defendant may not simply assert an error and then leave it to this Court to search for authority to support or reject the argument. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

Defendant's argument that the introduction of the tapes violated his right of confrontation is without merit because Walls testified at trial and was subject to cross-examination. *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004). ("when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").[3] Consequently, defendant's trial counsel was not ineffective for failing to make a meritless objection to the calls. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Defendant's argument that the introduction of the tapes violated his right of due process because the recordings were not transcribed is also without merit. The tape of the recordings was admitted into evidence as an exhibit and is part of the lower court record. MCR 7.210(A)(1). Defendant has not alleged that his appellate counsel was unable to review this exhibit to effectively advocate on his behalf. Cf. *People v Neal*, 459 Mich 72, 77-78; 586 NW2d 716 (1998).

D. EVIDENCE TECHNICIAN TESTIMONY

Next, defendant argues that trial counsel erred by not calling a police evidence technician to testify on defendant's behalf. According to defendant, the technician visited him in the hospital, "[and] used directional errors and placed them in Appellant's wounds in order to ascertain the direction and the location of the shooting." Defendant maintains that the witness's

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[2] We note that defendant advocates opposite positions regarding the introduction of the 911 evidence. We further note that defendant misconstrues the evidence presented at trial. Defendant refers to the objectionable evidence as a "dispatch call concerning a 911 call." According to the trial transcript, four recordings of 911 calls were played for the jury, including three calls from Walls and one from another male, presumably defendant's friend, Anthony Leek. The record does not support defendant's assertion that the trial court allowed the prosecution to play a separate "dispatch call" without admitting it into evidence, and defendant has not provided any other evidence of such a call.

[3] On appeal, defendant does not specifically contest the introduction of the fourth call apparently made by Leek. This call was made for an ambulance, to treat then bleeding defendant, and was thus not "testimonial" under *Crawford*. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). The substance of the call, i.e., the fact that defendant had been shot, was not in dispute here. Therefore, even were we to find error, defendant is not entitled to relief because any error in its admission was harmless beyond a reasonable doubt. See *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

testimony was critical to establishing that Thomas fabricated her version of the events. However, defendant has offered no proof, such as an affidavit from the technician, to suggest that this event occurred or that, if called, the technician would have testified favorably to defendant. Defendant has thus not met his burden of establishing the factual predicate for this claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6.

E. THOMAS'S PRIOR RELATIONSHIP WITH DEFENDANT

Defendant next claims that trial counsel erred by not calling witnesses to testify to the fact that defendant's relationship with Thomas "was far more than she was willing to reveal at trial." Defendant attaches an affidavit from a friend who states that he witnessed defendant and Thomas together in May and June of 2008. Defendant claims that this information would have undercut Thomas's testimony, particularly her claim that she was never in defendant's apartment, and her attempt at trial to distance herself from any intimate relationship with defendant.

Defendant cannot show that he was denied a substantial defense by trial counsel's decision not to call other witnesses to testify about his relationship with Thomas. During opening statements, the prosecution acknowledged Thomas's prior friendship with defendant, and stated that defendant had paid Thomas to cook and clean for him. Defendant's claim that Thomas testified at trial that she had not been in his apartment is inaccurate. Rather, Thomas testified that she had previously cooked and cleaned for defendant, and was still doing so as of May 30, 2008. Moreover, trial counsel demonstrated that Thomas, despite her contention that she was terrified of defendant, admitted that she went to his apartment building at least four times after the alleged break-in, and that defendant let her into the building. Trial counsel used this testimony during closing arguments to undercut Thomas's credibility. Defendant does not point to anything more specific that the additional witnesses would have added to his case. We find that defendant has not rebutted the presumption that trial counsel's decision was strategic, *Davis*, 250 Mich App at 368, or shown how any error on the part of trial counsel, if corrected, would have made a difference at trial, *Hyland*, 212 Mich App at 710.

F. CUMULATIVE ERRORS

Finally, defendant argues that he is entitled to relief due to the cumulative effect of the above errors. The cumulative effect of several minor errors may warrant reversal in some cases even where individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller*, 211 Mich App 30, 44; 535 NW2d 518 (1995). In order to reverse on the grounds of cumulative error, the errors must be of consequence. *Cooper*, 236 Mich App at 660. The effect of any errors must be seriously prejudicial to warrant a finding that the defendant was deprived of a fair trial. *Knapp*, 244 Mich App at 388. Defendant has not demonstrated any errors of consequence that combined to deny him a fair trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder